

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 22, 2016

CLAIM NO. 201373771

HENRY BROCK

PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE**

J. TURNER TRUCKING CO., INC.
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Henry Brock ("Brock") appeals from the November 13, 2015 Opinion, Order and Award rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). On appeal, Brock argues the ALJ calculated his average weekly wage ("AWW") incorrectly, and erroneously failed to rely upon the opinion of his treating physician. For the reasons set forth herein, we affirm.

Brock worked as a truck driver for J. Turner Trucking, Inc. ("Turner"). He alleged he was injured on March 7, 2013 when a load of frozen coal was dumped into the bed of his truck, violently jarring him. Immediately, Brock felt pain in his neck. Later that day, he developed a headache and back pain. Four days later, the pain was so bad that he visited the emergency room.

Brock was referred to Dr. Jose Echeverria, who diagnosed a pulled muscle and prescribed pain medication. On March 25, 2013, he visited Dr. Robert C. Hoskins, whose treatment included prescriptions for pain medication and muscle relaxers, as well as physical therapy. A month later, Dr. Hoskins ordered an MRI and, based on the results, suggested a neurosurgical evaluation, though Brock did not pursue this recommendation. In a written report dated December 3, 2013, Dr. Hoskins diagnosed cervical strain, cephalgia, C5-6 disc bulging, C6-7 and C7-T1 disc herniations, spinal stenosis, neuroforaminal stenosis, lumbosacral sprain, L4-5 disc herniation, L5-S1 anterolisthesis, and L4 radiculopathy. He assessed a 19% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). This impairment

rating was comprised of 8% for the cervical spine, and 12% for the lumbar spine.

Dr. Michael Best performed an independent medical evaluation ("IME") on October 22, 2013. Dr. Best diagnosed a cervical soft tissue sprain and a lumbar soft tissue sprain, both of which were resolved. Additionally, he ordered a functional capacity evaluation which he interpreted to be within normal limits for Brock's cervical spine. He assessed a 5% whole person impairment using lumbosacral DRE Category II of the AMA Guides.

Dr. Russell Travis conducted an IME on September 7, 2014. He diagnosed an acute sprain or strain superimposed on pre-existing spondylolysis. He assessed a 5% whole person impairment pursuant to the AMA Guides, attributing half to a pre-existing condition. He recommended a work-hardening and core-strengthening program.

The parties did not stipulate to Brock's AWW. He submitted a 2013 W-2, and argued he worked six weeks for Turner, earning \$5,001.00. Turner acknowledged Brock worked less than thirteen weeks, and submitted evidence as to what a similarly-situated employee would earn during a thirteen-week period.

The ALJ relied upon Drs. Best and Travis to conclude Brock suffers a 5% whole person impairment as a result of the work-related lumbar spine injury. The ALJ further determined the medical records evidenced a "decline in Brock's neck symptoms." He also noted Dr. Best's diagnosis of a cervical soft tissue sprain which had resolved, the normal findings of the functional capacity evaluation as it related to Brock's cervical spine, and the fact Dr. Travis assessed no impairment rating for a cervical spine injury. Relying on this evidence, the ALJ concluded Brock suffered no permanent impairment as a result of the cervical spine injury.

To determine Brock's AWW, the ALJ employed KRS 342.130(1)(e), which sets forth how an employee's AWW is calculated when the employee worked for the employer less than thirteen calendar weeks. Using this method, and relying upon the proof submitted by Turner as to what a similarly situated employee would earn, the ALJ determined Brock's AWW is \$404.31.

Brock did not file a petition for reconsideration, and now appeals. Because no petition for reconsideration was filed, the findings of fact made by the ALJ are conclusive. KRS 342.275. Furthermore, inadequate,

incomplete or even inaccurate fact-finding by the ALJ is insufficient to justify reversing the award. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81 (Ky. 2005).

On appeal, Brock first argues the ALJ erred in calculating his AWW. Turner provided Brock a 2013 W-2, which he submitted into evidence. It indicated Brock earned \$5,001.00 in the six weeks he worked for Turner. Further, Brock argues the ALJ should have considered his earnings during an additional fifteen-week period in 2012 during which he worked for another company owned by Turner's owner, Jackie Turner, and his partner. Brock testified he began working for this other company in September, 2012 and continued to work for the other company at the time of his March, 2013 injury at Turner. Based on this testimony, he claims he held concurrent contracts with two employers and, therefore, his average weekly wage should have been calculated pursuant to KRS 342.140(5). In a related argument, Brock claims the similar employee evidence, upon which the ALJ relied, was inaccurate.

Brock introduced his 2013 W-2 from Turner, but did not submit any additional proof demonstrating earnings from another company or business. Furthermore, he did not argue he was concurrently employed in his brief to the ALJ,

or otherwise raise the issue of simultaneous employment. Again, he did not file a petition for reconsideration requesting further findings of fact on the issue of concurrent employment or AWW. Therefore, the issue of concurrent employment was not properly raised before the ALJ nor preserved for review by this Board. Furthermore, we note Brock's testimony, alone, that he also worked for another company owned by Mr. Turner and his partner is simply insufficient to conclude he was under concurrent contracts of employment.

The ALJ made the factual finding Brock worked for Turner less than thirteen weeks when he was injured. This finding is conclusive. Nesco v. Haddix, 339 S.W.3d 465, 470-71 (Ky. 2011). As such, KRS 342.140(1)(e) governs the circumstances of this claim, and states the AWW "shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation." Thus, the ALJ was required to consider the earnings of similarly situated employees. This proof was

introduced without objection as to its accuracy. Therefore, the AWW reached by the ALJ is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

We acknowledge, as Brock urges, the ALJ enjoys the discretion to tailor the AWW calculation to the unique facts and circumstances of each case. Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999). He asserts the ALJ should have based the AWW calculation only on his W-2 earnings; that is, the ALJ should have divided his earnings during his six-week employment at Turner by six, to reach an accurate estimation of his earning capacity. Indeed, this method renders an AWW of \$883.50. However, we are bound by the factual findings made by the ALJ, including the determination Brock worked less than 13 weeks at Turner. As such, the ALJ was required by KRS 342.140(1)(e) to calculate the AWW through reference to the earnings of similarly situated employees.

Brock next argues the ALJ erroneously relied upon the opinions of Drs. Brock and Travis, and erred in finding no permanent impairment of the cervical spine. This claim of error amounts to little more than a re-argument of the merits of the case. Brock essentially argues the ALJ

should have been more persuaded by the opinion of Dr. Hoskins because he was a treating physician. However, the ALJ is not required to afford Dr. Hoskins' opinion more weight because he was a treating, rather than an evaluating, physician. Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008).

As the claimant in a workers' compensation proceeding, Brock had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek, 673 S.W.2d at 735. "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The opinions of Drs. Best and Travis constitute the requisite substantial evidence to support the award. Brock has identified conflicting proof that would support an alternative result, but this is insufficient to justify reversal and does not compel a different result.

Accordingly, the November 13, 2015 Opinion, Order and Award rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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